

1 one of the things he had in mind.

2 Q Okay. So you're now what you're
3 doing is you're saying "Looking back," now
4 kind of in football language, Monday morning
5 quarterback, "Looking back" --

6 A No.

7 Q What you're saying I think is you
8 should have seen it coming. Is that what this
9 says?

10 A No. It says that having made a
11 general statement that made it clear to me
12 that he was not happy with the fact that the
13 Versus network was going to be competing with
14 the NFL Network he now took a step to hobble
15 the NFL Network. So the two things hung
16 together very clearly.

17 Q In your mind, they hung together
18 looking back.

19 A Yes, because the general had now
20 become specific and the specific was
21 consistent with and in pursuant of what I
22 anticipated was the general.

1 Q At the time, let me put it this
2 way, your statement doesn't say "On January
3 27th I heard his comment and it foreshadowed
4 the retaliation." The statement you chose to
5 write to says "In retrospect I believe his
6 statement foreshadowed." These are your
7 words, correct?

8 A Yes. On January 27, he was
9 threatening in a veiled way without being
10 specific as to what he was going to do and how
11 he did it.

12 Q And in fact --

13 A It's consistent with what he said
14 on January 27th and in pursuance of the goal I
15 thought he was concerned about.

16 Q And in fact the words he spoke on
17 the 27th, these simple words, "It's an
18 unfortunate decision. It won't be a positive
19 for our relationship." Those were so vague
20 that you didn't have a sense then that
21 anything specific was being threatened. It's
22 only in retrospect that you can see it. Isn't

1 that right?

2 A No, I knew specific things were
3 being threatened, but I didn't know what they
4 were.

5 Q You never heard him threaten that
6 he was going to tier the Network in that
7 conversation on January 27th, correct?

8 A Correct.

9 Q There was no tiering threat by my
10 client, was there?

11 A Correct. I just said he veiled --
12 he made veiled threats in general terms
13 without being specific as to what they would
14 be. I understood why he was motivated to be
15 saying what he was saying. I did not know
16 what those things would be.

17 Q It's only in retrospect --

18 A With the benefit of --

19 Q I'm sorry.

20 A The benefit of hind's sight, I
21 found out what some of them were.

22 Q So you're here with the benefit of

1 hind's sight offering really this opinion in
2 paragraph four about from the perspective of
3 hind's sight what you think it foreshadowed,
4 correct?

5 A Yes.

6 Q Okay.

7 JUDGE SIPPEL: Can I?

8 MR. CARROLL: Sure, Your Honor.

9 JUDGE SIPPEL: And this just goes
10 to again the dynamics of the conversation is.
11 It seems to me that it's something that
12 important that you would want to go over to
13 him, his office, and visa versa and talk to
14 him personally or maybe go out to lunch or
15 something or whatever and this was all done on
16 the phone call. Is he not in the same area as
17 you? Where is his office?

18 THE WITNESS: We were in New York.
19 He was -- His office is in Philadelphia.

20 JUDGE SIPPEL: That's good.

21 That's reason enough I guess then. The other
22 question I have is was he on a speaker -- I

1 mean did he have other people in the office
2 with him? Do you have people in the office
3 with you? Is this one of those kinds of
4 things?

5 THE WITNESS: I don't whether he
6 had other people with him or not. I don't
7 think I had anyone with me.

8 JUDGE SIPPEL: He was not on a
9 speaker phone then?

10 THE WITNESS: I don't know whether
11 he was or not. Sometimes people are on
12 speaker phones and they don't tell you and you
13 don't learn it until you hear the echo in the
14 background. I just don't know or I don't
15 remember.

16 JUDGE SIPPEL: In a conversation
17 like this, you would be -- Well, not concerned
18 about that, but you would be alert for it,
19 wouldn't you? This is a pretty -- It seems to
20 me it's a pretty delicate thing to be doing.
21 Well, I shouldn't use that term. Anyway, it
22 just seems to me it's the type of phone call

1 that you would want to be very astute or alert
2 to what's going on on the other side.

3 THE WITNESS: Yes, absolutely.

4 And I think I was astute. I understood that
5 he was saying things that were trying to get
6 me to change my mind as to what we had
7 decided, trying to reopen the issue and in
8 fact come back to the table and rethink it.
9 But if you don't, we're not going to have a
10 very positive relationship going forward.

11 JUDGE SIPPEL: Well, the way
12 you're explaining it today it's sounding as
13 though that he went from -- Let's put it on a
14 temperature basis. He went like from 70
15 degrees up to 90 degrees in a matter of
16 whatever the conversation was. Because when
17 you come back at somebody with any kind of a
18 threat in any kind of a context, a
19 professional business context, it makes it
20 even that much more extreme I would say I
21 would think. And because you're just going to
22 brush this off and say, "Well, that's the way

1 the business goes here." You went back to
2 your people and said, "Yes, he was a little
3 bit disappointed."

4 That's Mr. Roberts. That's the
5 why he talks.

6 THE WITNESS: We had had prior
7 conversations where he had said that if we can
8 get an agreement done on put the games on the
9 Versus network I can be helpful with the cable
10 industry. If we don't get an agreement done,
11 I can be not so helpful with the cable
12 industry. So I had heard things like this
13 before.

14 JUDGE SIPPEL: Did you ever come
15 back at him and say, "Now wait a minute. Wait
16 a minute. What I hear you saying is such and
17 such. And the NFL is not going to get pushed
18 around like that." I mean, is there any kind
19 of that? Maybe that's not your style, but --

20 THE WITNESS: That's not my style.
21 My predecessor used to tell me if people make
22 a proposal to you put it in the file. If they

1 threaten you put it in the trash can.

2 JUDGE SIPPEL: Now they go on the
3 recorder or something like that. All right,
4 sir. I'm sorry. I didn't mean to --

5 MR. CARROLL: No, Your Honor.

6 THE WITNESS: Like I say I didn't
7 think although he was disappointed in the
8 direction we were going. As I stated, he was
9 becoming assertive. He was saying what he was
10 saying for the purpose of trying to get me to
11 change my mind and reopen the decision and if
12 we didn't then we were going to be living in
13 an environment in the future that was going to
14 be different from the past and our dealings
15 with the cable industry which was an important
16 thing for me. He was talking about the cable
17 industry and not just Comcast.

18 JUDGE SIPPEL: Well, I agree with
19 how you conclude there and I'm not trying to
20 argue this with you. But I'm just trying to
21 think in terms of again if you thought that --
22 I mean you knew the man. I mean you knew his

1 dynamics because you had been back and forth
2 with him a number of times about a number of
3 things and I would think that you would have
4 a sense that this was a threat or this was
5 just Mr. Roberts blowing off steam and in 24
6 hours he would get over it and this is just --

7 THE WITNESS: His temperature
8 doesn't go from 70 to 90. It goes from 70 to
9 70. It stays at 70. Mine stays at 70. I
10 don't shout at people. He doesn't shout at
11 people. He just makes himself clear.

12 MR. CARROLL: May I?

13 JUDGE SIPPEL: Sure, absolutely.

14 MR. CARROLL: I'm going to stay
15 right on that.

16 BY MR. CARROLL:

17 Q And actually, that's not all that
18 was said in the conversation, though. You two
19 keep talking about Mr. Roberts makes this
20 statement, correct?

21 A Yes.

22 Q Yes, you keep talking.

1 A I tried to persuade him that we
2 could have a constructive relationship.

3 Q And in fact one of the things you
4 talk about is, he says, I think the owners
5 have made a mistake. And you almost agree.
6 You say, they might have made a mistake.
7 Isn't that true?

8 A You are mischaracterizing what I
9 said in my deposition. But I'll be happy to
10 tell you what the conversation was.

11 Q Well, I don't think I'm
12 mischaracterizing.

13 JUDGE SIPPEL: Well, let's not
14 argue about that. Ask him a question.

15 BY MR. CARROLL:

16 Q Did Mr. Roberts say to you as you
17 continue to talk, without raising his voice,
18 gee, I think the owners have made a mistake
19 here?

20 A Yes, he did.

21 Q And did you - what did you say in
22 response when he said that?

1 A In order to explain what I said in
2 response, I should tell you what I said that
3 led to his statement. But what I said in
4 response was that, yes, I know they are
5 getting into an area of business that they
6 haven't been in before, which is distribution.
7 And they may be making a mistake. If they are
8 making a mistake, they'll learn that they made
9 a mistake. They may not be making a mistake;
10 if they are not making a mistake, they'll
11 learn that they didn't make a mistake. That's
12 what you do in business. You make judgments
13 and you take risks. If your risks are
14 reasonable you go forward with your judgment.
15 If your risks are unreasonable you either made
16 a bad judgment or you should rethink it.

17 But he said you'd be better off
18 sticking with your core competency which is
19 licensing content rather than getting into
20 distribution. I explained to him that for a
21 number of years owners had been telling me
22 that they thought we should be in distribution

1 businesses, so now we are getting into a
2 distribution business, and if they made a
3 mistake, they made a mistake. If they didn't
4 make a mistake, they were wise.

5 I'm a big believer, as I told you
6 in my deposition, that every generation has to
7 learn for itself. We are learning that as a
8 nation today; it's unfortunate, but that is
9 human nature.

10 Q And both of you had this exchange,
11 in a cordial tongue, with no one screaming at
12 each other.

13 A Right.

14 Q And in fact your view at the end
15 of the discussions was that the two of you -
16 let me get your exact words here - had had a
17 very healthy constructive negotiation.

18 A Absolutely, and I tried to
19 persuade him at the end of this conversation
20 we could have a constructive relationship
21 going forward, which he was outlining a rather
22 unconstructive relationship. And I said, I

1 don't see the role that way. I think we can
2 have a constructive relationship going
3 forward.

4 Q Your testimony, and this is pages
5 - if you want to look at it you are welcome to
6 - of 157 and 158 of your deposition, you
7 describe your dealings with Mr. Roberts, you
8 said, I think we had a very healthy
9 constructive negotiation which just didn't
10 come to an agreement on a joint venture.

11 JUDGE SIPPEL: What is that?

12 MR. CARROLL: I'm sorry, 157, I'm
13 picking up at line 22. Tell me when you're
14 there.

15 Line 22, where you say, I think we
16 had a very healthy constructive negotiation
17 which just didn't come to an agreement on a
18 joint venture. I really feel that we got
19 beyond a lot of that history and had a very
20 serious in depth constructive professional
21 negotiation. We just didn't get to the point
22 where the interests of the two companies were

1 properly aligned in my judgment to have a
2 deal.

3 Have I read it correctly?

4 THE WITNESS: Correct.

5 BY MR. CARROLL:

6 Q And that was your view?

7 A Still is.

8 Q Still is? We've reached agreement
9 on another point.

10 Let me move now to the decision,
11 to the League's decision not to give my client
12 the games. The League made a decision before
13 you had the phone call with Mr. Roberts not to
14 give Comcast the games, right?

15 A Correct.

16 Q Okay. And I think in your direct
17 testimony with Mr. Phillips, you had
18 referenced the fact that there was kind of -
19 it was exciting the idea of doing a deal with
20 Comcast because it would be new for each side.
21 But that's also, I think your phrase was,
22 that's ultimately what brought the thing down.

1 Remember that?

2 A Yes.

3 Q And I want to focus on that "new"
4 for each side. For the Comcast side in
5 particular were there discussions that led to
6 Comcast not getting the games, about the fact
7 that this would be a new thing for Comcast
8 because they would be taking on content; they
9 wouldn't be just a cable distributor now,
10 they'd actually be going into the content side
11 of the business?

12 A Yes, there were discussions of
13 what. They didn't have production experience
14 to the same degree the networks have
15 production experience, et cetera, et cetera.

16 Q And do you remember in particular
17 there were discussions you led with the owners
18 in which you discussed that exact
19 consideration, the fact that Comcast would be
20 - up to this point was really a cable
21 distributor, and now you were thinking about
22 going into business with them as a content

1 provider. Remember that?

2 A Yes. They had some content in
3 Philadelphia where they had interests in a
4 hockey team, I think, and things like that.
5 But in terms of a national network this was a
6 different direction for them.

7 Q Right. And you were concerned
8 that because it was new for them there'd be an
9 issue. Would they be interested enough in
10 building up the new program side, the content
11 side, or would they continue to operate
12 basically as a cable distributor and try to
13 keep prices low. Do you remember that
14 concern?

15 A That was one of the concerns, yes.
16 It was an opportunity and a concern.

17 Q And the concern was that cable
18 companies on the distribution side are focused
19 on keeping prices low, and that's not what you
20 wanted as the content owner of this eight-game
21 package, correct?

22 A That's an oversimplification and

1 not quite accurate.

2 Q Isn't it correct that you believed
3 that you wanted to drive the value of the new
4 venture, which would lead to higher prices,
5 and you were concerned that because Comcast
6 was a cable distributor they might have a
7 different view and want to keep the prices
8 down low?

9 A We were concerned that they had a
10 conflict of interest.

11 Q And that was the conflict, the one
12 I just described?

13 A That in a competitive economy you
14 have a conflict of interest if you are in a
15 position where you are supposed to be
16 competing to pay a competitive price for
17 someone's rights but you have a conflicting
18 interest in terms of what you can in turn -
19 what your cost structure is going to be.

20 Q But the conflicting interest here
21 is that because they are a cable distributor,
22 they might want to keep prices down, right?

1 A Yes. In an anti-competitive way.

2 That's not what a competitive economy is

3 about.

4 Q Anti-competitive? Didn't you talk

5 to the owners about this, and you didn't say

6 anything about anti-competitive, did you?

7 A Yes. We talked about a conflict

8 of interest.

9 MR. CARROLL: This is already

10 marked, Your Honor. Exhibit Comcast Exhibit

11 No. 250. And we should have a copy of this,

12 but I have other copies to distribute.

13 JUDGE SIPPEL: Well, I'll feel

14 bad if I've lost my copy.

15 MR. CARROLL: Well, don't,

16 because look at our table. Would you like

17 another copy?

18 JUDGE SIPPEL: No, sir. 250?

19 MR. CARROLL: Would you like

20 another copy? And I'm happy to distribute to

21 my worthy adversaries too if they'd like.

22 JUDGE SIPPEL: Well, you might as

1 well give me one too. Thank you.

2 MR. CARROLL: And may I hand 250
3 to the witness as well?

4 JUDGE SIPPEL: Please do.

5 (Whereupon the aforementioned
6 document was marked for
7 identification as Comcast Exhibit
8 No. 250.)

9 JUDGE SIPPEL: Mr. Phillips, are
10 you on board?

11 MR. CARROLL: I'm not going to
12 get into any financial numbers.

13 MR. PHILLIPS: Mr. Carroll says
14 this, Your Honor, because this document does
15 have highly confidential financial information
16 in here. If he doesn't ask about it I don't
17 have a problem.

18 JUDGE SIPPEL: All right. This
19 is a confidential document, and you know how
20 to do it. Go ahead.

21 MR. CARROLL: And I know I will
22 be scolded if I step across and I won't.

1 BY MR. CARROLL:

2 Q All right, we've handed to you,
3 Mr. Tagliabue, what's been marked as Comcast
4 Exhibit No. 250. It's headed, Broadcast
5 Committee Presentation, January 25, 2006,
6 right?

7 A Yes.

8 Q You recognize this as a slide
9 pack, a PowerPoint presentation that was used
10 with the broadcast committee of the owners on
11 or about January 25, 2006?

12 A If this is the same one we had in
13 our deposition, then obviously I recognize it.
14 In my deposition you gave me a chance to
15 review it.

16 Q And it is the same one.

17 A Then it is.

18 Q Excellent, we are agreeing more
19 and more.

20 A More and more.

21 JUDGE SIPPEL: Does that mean the
22 case is going to settle soon?

1 (Laughter.)

2 JUDGE SIPPEL: Go ahead.

3 BY MR. CARROLL:

4 Q And this is right around the time
5 the decision is made, so your phone call to
6 Mr. Roberts is two days later, so we are right
7 up at decision time?

8 A Yes.

9 Q Okay, if you will turn - the page
10 I want you to go to is page 10. This slide is
11 headed, Comcast Deal: Rationale and
12 Considerations. Tell me when you are there.

13 A Yes, I have it.

14 Q Okay. And on the left side we
15 have rationale, on the right side we have
16 considerations. Remember at your deposition
17 you and I went back and forth a little while
18 on rationale and considerations.

19 A Whether that meant pros or cons.

20 Q So I won't do it that way. Let me
21 do it this way.

22 The rationale on the left side are

1 reasons why you might go forward with a
2 Comcast deal; the considerations on the rate
3 are reasons why you might have second thoughts
4 and not go forward with it. Fair?

5 A Pretty fair.

6 Q Okay, good. Now let's look under
7 the considerations, the reasons why you might
8 not go forward with Comcast. And the first
9 one listed is potential misalignment of NFL
10 Comcast strategic objectives. And then there
11 is a little subheading: Comcast objective.
12 And the first bullet says, build programming
13 asset or control sports rights pricing. Have
14 I read it correctly?

15 A Yes.

16 Q And the next one under it says,
17 drive OLN value, or Comcast value; correct.

18 A That's a question.

19 Q And there is a question after
20 that, after both of them. Do you see that?

21 A Yes.

22 Q Okay, and those two bullets go

1 together in the sense that the build
2 programming asset which drive OLN and value,
3 and the control sports right pricing might be
4 linked to Comcast value; fair?

5 A I don't know, I couldn't be that
6 specific. I know that the first one has to do
7 with building programming asset, what are you
8 going to pay for the programming, is it your
9 objective to control sports rights pricing.

10 The second one had to do with the
11 parent-subsidiary relationship, whether the
12 two were symmetrical or not.

13 Q Okay, let's focus on the first
14 one, because that is the one I had been asking
15 you about before I showed you the slide,
16 that's the topic I wanted to discuss with you.

17 So the question that the NFL
18 Owners are discussing in this slide deck is,
19 if we do this deal with Comcast, is Comcast
20 going to want to build the programming asset
21 with us? Or are they going to want to try to
22 control sports rights pricing; correct?

1 A Yes, I suppose there are some gray
2 areas in the middle, but those were among the
3 issues we discussed and the concerns we had,
4 yes, and including the question of who within
5 the venture was going to make the decision on
6 how to bid for rights, from other enterprises.

7 Q Okay, and the reason for the
8 control of sports rights pricing is because it
9 was well known by this point that cable
10 operators like Comcast did not like to pay
11 high prices for sports programming; they were
12 always trying to drive down those prices,
13 correct?

14 A I wouldn't say that was true, but
15 there were examples of that, and there were
16 examples where TNT and others came in and bid
17 for prices.

18 JUDGE SIPPEL: Who came in?

19 THE WITNESS: TNT. We had
20 experiences in the early '90s with the cable
21 operators where they actually supported a very
22 aggressive bid for NFL television rights. It

1 was Turner Network Television; I think it was
2 TNT. And at that time the League had been
3 dealing with ESPN, and Turner Network
4 Television came in and bid aggressively for a
5 half-season package. And that bid was
6 supported by some of the large cable system
7 operators including Time Warner because they
8 thought that it could expand their
9 distribution and give them advertising units
10 to sell that would enhance their revenue. So
11 there is a history here that sometimes cuts in
12 one direction, sometimes cuts in the other
13 direction.

14 Q Let me ask it this way.

15 A That's why these were posed as
16 questions.

17 Q As a cable distributor, as a cable
18 operator, Comcast for sports programming like
19 ESPN, they have to pay ESPN a license fee to
20 get that program; correct?

21 A Yes.

22 Q Okay, and as a cable distributor,